

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES C. MORTON,

Defendant-Appellant.

UNPUBLISHED

December 11, 2001

No. 224822

Wayne Circuit Court

LC No. 98-009200

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv), and was sentenced to a term of four to twenty years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first argues that the evidence was insufficient to support his conviction. In reviewing challenges to the sufficiency of evidence, we view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

The elements of possession with intent to deliver less than fifty grams of heroin are (1) that the recovered substance is heroin, (2) that the heroin is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the heroin with the intent to deliver. See, e.g., *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Defendant does not contest the first three elements. He claims only that the prosecutor failed to prove the fourth element, i.e., that he possessed the heroin with the intent to deliver it. We disagree.

The possession necessary to support defendant's conviction can be either actual or constructive. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). Such possession may also be joint, with more than one person actually or constructively possessing a controlled substance. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). "[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Wolfe, supra* at 521. A defendant may properly be found to

have possessed a controlled substance even though the drugs were not within the defendant's actual, physical control. *Id.* "The essential question is whether the defendant had dominion or control over the controlled substance." *Id.*

Here, the evidence at trial indicated that defendant accompanied Melvin Williams, an admitted drug dealer, to a known drug house in order to deliver drugs. According to the testimony of police officers who witnessed the event, defendant drove Williams to the Parkside Street residence where defendant waited outside the home in a green Pontiac Grand Am while Williams went inside to make the delivery. After Williams returned to the car "counting money," defendant drove Williams back to Williams' residence on Princeton where the two went inside. Defendant was then seen coming out of the home a short time later carrying a blue gift bag, which he placed in the rear seat of the Pontiac. Using keys confiscated from defendant during a raid of Williams' home later that day, police entered the Pontiac and seized the gift bag after finding that the bag contained over \$10,000 in cash, as well as 60 small plastic baggies containing 1.4 grams each of a powder containing heroin. We find this evidence to be sufficient to indicate that defendant exercised dominion or control over the controlled substance found in the blue gift bag, and that he possessed that substance with the intent to deliver it.

To the extent defendant claims that there was conflicting evidence concerning his guilt, "the question is not whether there was conflicting evidence, but rather whether there was evidence that the jury, sitting as the trier of fact, could choose to believe and, if it did so believe that evidence, that the evidence would justify convicting defendant." *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994), *aff'd* 450 Mich 349 (1995). Accordingly, despite the discrepancies concerning where the keys to the Pontiac were found and Williams denial of defendant's involvement in this matter, police testimony supporting that defendant possessed the heroin with the intent to deliver it, coupled with codefendant Williams' admission that he was a drug dealer and that he was making a delivery to the Parkside residence on the day in question, was sufficient to support defendant's conviction.

II

Next, defendant challenges the admission of testimony of "unrelated drug activity" committed by codefendant Williams and his drug organization. We review the admission of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Generally, all relevant evidence is admissible at trial. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. [*People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001) (Citations omitted).]

Contrary to defendant's assertion, we find that the evidence challenged here – police testimony indicating that Williams was running a drug trafficking organization and had previously supplied drugs to the occupants of the Parkside residence – was relevant to the

charges against defendant. A person who aids or abets in the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39; *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). Here, it was the prosecutor's theory that on the date in question, defendant aided and abetted Williams in possessing heroin with the intent to deliver it. Although the acts complained of were not those of defendant, they were nonetheless relevant to show that at the time of the charged offense, Williams was acting in accordance with an established "scheme, plan, or system." MRE 404(b). Thus, under a theory of aiding and abetting, the challenged evidence was equally relevant to defendant's guilt of the charged crime.¹ Moreover, although the evidence was prejudicial, there is nothing to indicate that the probative value of the evidence was substantially outweighed by its prejudicial effect. This issue does not, therefore, warrant reversal.

III

Finally, we reject defendant's claim that he is entitled to be resentenced because the trial court incorrectly scored the sentencing guidelines. To state a cognizable claim of legal error regarding misapplication of the judicial sentencing guidelines, defendant must prove that a factual predicate underlying the sentence is wholly unsupported or materially false, and that the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). Contrary to defendant's assertion, we find sufficient evidence on this record to support the trial court's scoring of offense variables eight and sixteen. Moreover, even were we to accept defendant's claim that these variables were more properly scored at zero, defendant's minimum sentence of four years (48 months) would still be within the recommended range of the sentencing guidelines. A sentence imposed within an applicable judicial sentencing guideline range is presumptively proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Accordingly, because defendant has failed to present any unusual circumstances that would overcome that presumption, see *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994), his challenge to the guidelines scoring does not provide a basis for resentencing.

We affirm.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff

¹ In reaching this conclusion we reject defendant's reliance on *People v Malone*, 180 Mich App 347; 447 NW2d 157 (1989), *People v Smith*, 85 Mich App 404; 271 NW2d 252 (1978), and *People v Salata*, 79 Mich App 415; 262 NW2d 844 (1977), where the prosecutors' attempts to prove the defendants' guilt by introducing evidence of other similar acts committed by others were found to be error. Unlike the situation presented here, in none of these cases did the prosecution argue the defendant's guilt on a theory of aiding and abetting.